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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-328

HARRY J. LEHMAN,
Petitioner,

vs.

CITY OF SHAKER HEIGHTS and METROMEDIA, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENTS IN OPPOSITION

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The City of Shaker Heights and Metromedia, Inc., the respondents, submit this Brief in Opposition to Petition for a Writ of Certiorari pursuant to Rule 24 of the Rules of the Supreme Court of the United States.

PRELIMINARY ANALYSIS

The Petitioner presents the following two questions to the Court:

1. Whether the First Amendment precludes a municipality from refusing to sell political advertising when it sells all other forms of paid commercial and non-commercial advertising for display upon a transit system it owns and operates.

2. Whether a municipality, having opened a forum to some type of expression can discriminate against paid political advertisements in favor of paid commercial advertisements.

At the outset, Respondents answer by stating their position as follows:

> That a municipality may lawfully prohibit all political advertising in a municipally owned transit system while accepting paid commercial advertisements. That paid political advertising and paid commercial advertising are separate classifications of advertising and the permission for commercial advertising, only, does not work to deny the respondent any constitutional right to politically advertise for the office he was seeking.

The Petitioner argues two reasons for granting a writ, that the United States Supreme Court has never directly ruled upon any of the important questions involved in this case, and that the decision of the Ohio Supreme Court is in direct conflict with a score of recent decisions of the United States Supreme Court and other courts that once a state opens a forum for speech, the forum must be held open to all speakers.

In response, it should be pointed out that in *Columbia Broadcasting Systems, Inc. v. Democratic National Committee*, 93 S. Ct. 2080 (1973), a case cited by the Petitioner, this Court held that:

> Neither the Communications Act nor the First Amendment requires broadcasters to accept paid editorial advertisements.

But, while *Columbia Broadcasting* suggests that broadcasters need not accept all forms of advertising, nothing therein suggests that a municipally owned transit system, having accepted commercial advertisments, is some-

how pressed by constitutional mandate to accept a paid political advertisement for a candidate running for office.

STATEMENT OF FACTS

This action was brought in the Common Pleas Court of Cuyahoga County by plaintiff-petitioner, Harry J. Lehman, against defendants-respondents, City of Shaker Heights, Mayor Paul K. Jones of Shaker Heights, and Metromedia, Inc., seeking the following relief:

1. That the court restrain the defendants-respondents from refusing to accept plaintiff-petitioner's proffered political advertisements for display on Shaker Heights Rapid Transit cars.

2. That the court declare that the policy of the defendant-respondent City of Shaker Heights infringed upon rights guaranteed to plaintiff-petitioner by the First and Fourteenth Amendments of the United States Constitution and Article I, Section 11, of the Ohio Constitution.

The evidence adduced at the trial in Common Pleas Court showed that for over twenty-five years, since the Shaker Heights Rapid Transit System became municipally owned and operated, the consistent policy and practice of the City of Shaker Heights has been not to permit the use of Rapid Transit property for political or public issue advertising of any sort. The policy has been all-inclusive and non-discriminating, so that not even issues or candidates of the City itself or other public agencies are advertised in this manner.

The reasons and purpose for the adoption and enforcement of this policy by the City officials are obvious. The

City officials have determined that it is in the best interest of the City not to open up Rapid Transit vehicles to any political or other First Amendment types of communication, in order to avoid any possibility, appearance, or suspicion of political favoritism, unequal protection of the law, or discrimination.

The Court of Common Pleas for Cuyahoga County denied plaintiff-petitioner's request for a temporary and permanent injunction and declared that his rights under the Constitutions of the State of Ohio and the United States had not been violated or infringed upon by the City's determination to adhere to its long-standing, non-discriminatory policy of not accepting political advertising for display in Rapid Transit cars.

Plaintiff-petitioner appealed the judgment of the Common Pleas Court to the Eighth Judicial District Court of Appeals which held that the policy of the City of Shaker Heights is a reasonable regulation of the right to post political signs and as such denies appellant neither freedom of speech nor equal protection of the law.

The Ohio Supreme Court affirmed and held in its syllabus:

> Where a municipality has approved the acceptance of commercial advertisements for display in its owned and operated rapid transit vehicles and refuses to accept any political advertisements urging the candidacy of an aspirant to political office, such refusal is not a violation of the candidate's rights of free speech and equal protection under the First and Fourteenth Amendments to the United States Constitution and Section 11 of Article I of the Ohio Constitution.

The Supreme Court of Ohio in its holding found:

> The proponents are confusing free speech forums with the marketplace. Purveyors of goods and serv-

> ices saleable in commerce may purchase advertising space on an equal basis, whether they be house builders or butchers. They are coursing in the stream of commerce. But the Rapid Transit System has determined that political advertising is not acceptable as a matter of long-time policy because of the "chances for abuse, the possibility of discrimination or favoritism, and the risk of violating the passengers' rights." There is no distinction as to candidates. As a class, they are excluded from using the rapid transit vehicles for their political advertising.

The Ohio Supreme Court relied on *Packer Corp. v. Utah* (1932), 285 U.S. 105, 110, that street car advertising is a special class of advertising. Justice Brandeis wrote the opinion which approved the Utah Supreme Court opinion.

> * * * Advertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard. These distinctions clearly place this kind of advertisement in a position so that regulations or prohibitions may be imposed upon all within the class * * *

The Supreme Court of Ohio in its opinion further said:

> Manifestly, there is no denial of equal protection of the laws, as claimed by plaintiff, because everybody in his class as a candidate for public office is treated identically, and his political advertising is not accepted because of policy. Shaker Heights sets plaintiff's class

apart from house builders, butchers and other business entrepreneurs who regularly patronize the commercial advertising market and who are the commercial customers of the Shaker Heights Rapid Transit System advertising plan.

ARGUMENT

A long-standing policy of a municipality in accepting only commercial advertising for display in Rapid Transit vehicles is a reasonable, non-arbitrary, and constitutionally permissible regulation of a governmentally owned and operated transit system.

The Supreme Court of Ohio has made it clear that the right to erect or place political signs is not absolute but is subject to reasonable regulation by a municipality. In *Peltz v. City of South Euclid*, 11 Ohio St. 2d 128 (1967), the Ohio Supreme Court declared unconstitutional a broad regulation which prohibited the display of all political signs within the boundaries of the City of South Euclid. In reaching this holding, the Court stated:

> A municipality is not powerless to enact and enforce reasonable regulations . . . *It may enact ordinances prohibiting the attachment of political posters to public property and permitting recovery of the cost of removal of such posters.* 11 Ohio St. 2d at 133. (Emphasis added.)

Peltz, therefore, unequivocally illustrates that the right to post political signs is not absolute, but rather is subject to reasonable regulation by the municipality. See also *Brayton v. City of Anchorage*, 386 P.2d 832 (S. Ct. Alaska 1963).

The limitation upon political advertising in the instant case is considerably more limited in scope than the prohibition which was questioned in *Peltz*. The City of Shaker

Heights has not enacted an absolute prohibition of all political signs within its borders. It only refuses political advertisement on and within a particular and limited area of public property, that is, on and within Rapid Transit cars. Thus, there is no absolute prohibition of political signs within the municipality, but merely a reasonable policy limiting the attachment of political posters to certain public property. The area of limitation is not oppressive because the policy applies only to the city-owned and operated Rapid Transit cars and does not affect political advertising in any of the usual communications media within the City.

It is further submitted that the policy or rule of the City of Shaker Heights which would be violated by the acceptance of Petitioner's advertising is a reasonable, purposeful and appropriate policy. It is a policy which has been adhered to without deviation and without discrimination and is based on a reasonable, non-arbitrary classification. It has been uniformly adhered to for over 27 years and during that time has been challenged but once prior to the institution of this lawsuit.

Political advertisements in the cars of the Shaker Heights Rapid Transit, which is owned and operated by the City of Shaker Heights, would suggest, on the one hand, that some political favoritism is being granted to the candidate so advertised, or, on the other hand, that the candidate so advertised is being supported or promoted by the government of the City. The City itself should not, and does not, use public funds or public property for the advancement or promotion of any public candidate or political issue. It follows, therefore, that the City should not lend public facilities to the same end.

The mere acceptance of commercial advertisements for display in publicly owned and operated rapid transit vehicles does not transform these v e h i c l e s into "forums," such as newspapers, magazines, radio, and television, in which the unrestricted expression of all forms of ideas must be constitutionally allowed.

A long line of decisions has also established the rule that commercial messages do not come within the ambit of First Amendment protection. (See *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1119). Appellant has recognized, in the present case, that there would be no constitutional question involved and no deprivation of his rights of freedom of speech under the First Amendment to the United States Constitution or Article I, Section 11, of the Ohio Constitution, if the City did not permit *any* advertising in or upon its Rapid Transit vehicles. That is, there is no absolute or protected right to place advertising material or political advertising on City transit cars which is comparable to the constitutionally protected right of free speech with respect to oral pronouncements or the distribution of literature on the public streets.

Contrary to the Shaker Heights ordinance and the contract with Metromedia, Inc. which provides for an absolute prohibition against political advertising in any form, the cases cited by appellant involve discriminatory or vague local policy, such as that discussed in *Wirta v. Alameda Contra Costa Transit District*, 64 Cal. Rptr. 430, 434 P.2d 982 (1967). In addition to commercial advertising, the transit board in the *Wirta* case accepted *some* political advertising, to wit: "in connection with and at the time of a duly called election" being held within the boundaries of the transit district. Thus, the case involved a discriminatory practice and did not involve "absolute exclusion of all political advertising" as suggested by ap-

pellant. Nevertheless, the court in the *Wirta* case was narrowly split, four justices to three, and in a vigorous dissent three members of the court said that the majority's assumption that the transit district had opened up a "forum" for the expression of ideas was incorrect. The dissenters agreed that the transit board may not "pick and choose between ideas advanced." In the present case there is even less basis than there was in the *Wirta* case for assuming that a "forum" for the expression of ideas has been opened up, and the City of Shaker Heights certainly has not been guilty of "picking and choosing between ideas" by merely separating commercial from political advertisements.

In reply to some of petitioner's citations, it is submitted:

The case of *Danskin v. San Diego Unified School Dist.*, 28 Cal. 2d 536, 171 P.2d 885 (1946), is distinguishable. In that case the San Diego Civil Liberties Committee brought up the issue of the availability of public school buildings for public meetings. The use of the building was contingent upon the Civil Liberties Committee taking a loyalty oath.

In *Kissinger v. New York City Transit Authority*, 274 F. Supp. 438 (S.D. N.Y., 1967), the facts are again distinguishable. In an attempt to place anti-Vietnam war literature in transit cars, the Students for a Democratic Society were challenging the New York Transit Authority's contract rights with the New York Subways Advertising Company which allowed the Transit Authority to reject an "objectionable" advertisement; again, a vague, standardless policy. The instant case does not involve such a vague standard. It is distinguishable because it involves an absolute prohibition of political advertisement within a limited area of public property.

Zucker v. Panitz, 299 F. Supp. 102 (S.D. N.Y., 1969), concerned the right of high school students to publish a paid advertisement opposing the war in Vietnam in their school newspaper. It should be pointed out that a school newspaper is a forum for dissemination and *exchange* of ideas, and that the essence of First Amendment protection is extended to that very dissemination and exchange of ideas. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Shaker Rapid Transit cars are not a forum in the same sense that a student newspaper is a forum; there can be no possibility of the exchange and interplay of ideas in the so-called forum created by advertising whose message travels in one direction only and falls upon subjects who must remain mute. See *Packer Corporation v. State of Utah*, 285 U.S. 105, 110 (1932).

Similarly, *Lee v. Board of Regents of State Colleges*, 306 F. Supp. 1097 (W.D. Wis. 1969), involved a campus newspaper's acceptance of commercial advertisements and of those public service advertisements that did not attack an institution, group, person or product. The court held that this was an impermissible form of censorship. In the instant case, Shaker Rapid Transit cars do not constitute a "forum" as did this campus newspaper. No judgment or determination is required of Shaker Heights officials as to whether an advertisement is negative or positive. In the present case the "one-way" message of the political advertising in question does not lend itself to the *exchange* of ideas so favored by the First Amendment, and is akin to propaganda which bears down upon a captive audience.

In the *Wirta* case *supra* the court made an *a fortiori* assumption that permitting the display of commercial advertising has the effect of opening a limitless forum. Judge Finley, in his concurring opinion in *Hillside Community Church, Inc. v. City of Tacoma*, did not challenge the majority's conclusion that a forum existed in that case.

However, he felt it necessary to indicate, as set forth below, that the *Wirta* argument for the presence of a forum was unconvincing:

> The a fortiori form assumes that the interests involved in commercial expression and First Amendment speech are the same, and hence that to allow the former means the latter must be allowed. But the transit system may have allowed the former because the messages which it conveys *are* unimportant, *do not reach* fundamental values, *and do not deeply arouse* emotional responses. It may be tolerable precisely because it is trivial. 455 P.2d at 356.

Justice Black, in his concurring opinion in *Public Utilities Commission v. Pollack*, 343 U.S. 451 (1952), stated:

> . . . . Capital Transit's musical programs (which also included commercial messages) have not violated the First Amendment. I am of the opinion, however, that subjecting Capital Transit's passengers to the broadcasting of news, public speeches, views, or propaganda of any kind and by any means would violate the First Amendment. 343 U.S. at 366.

Thus, Justice Black recognized that there is a definite distinction between subjecting a captive audience to commerical messages, on the one hand, and political messages, on the other.

It has been held by the United States Supreme Court in *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969), that the public has a First Amendment interest in the mode, manner, and content of public debate aired on the broadcast media. Petitioner advocates that principles applicable to the communications media, which have been recognized to be affected with strong First Amendment interests, be extended to display advertising in rapid transit cars. However, rapid transit cars have long been recognized by the United States Supreme Court as an advertis-

ing medium that is to be distinguished from other advertising media. Petitioner totally ignores Justice Brandeis' opinion in *Packer Corporation v. State of Utah, supra,* which held that street car advertising is a special class of advertising.

Thus, contrary to the Petitioner's contention, the decisions in the free speech area may not be applied across the board to the Rapid Transit situation since there is a fundamental difference between, on the one hand, transit cars and, on the other, communications media such as newspapers, magazines, radio, and television, the primary purpose of which is to serve as a forum for the exchange and interplay of ideas.

Next, it must be pointed out that *Valentine v. Chrestensen,* 316 U.S. 52 (1942), said that the control of commercial advertising is entirely within the scope of local government. Absent a specific holding by this Court on this topic, it would appear not only that a local government may regulate what type of commercial advertising it takes, but that it is within a city's power to take *only* commercial advertising, and thus prevent the possible opening of a forum for any and all types of expression.

In *Valentine* there was an ordinance prohibiting dissemination of handbills and circulars. The distinguishing feature of this ordinance was its application only to *commercial* advertising matter. The defendant had prepared handbills advertising his business. The police advised him that only handbills on public issues would be lawful. Defendant then attempted to sidestep the ordinance by printing his advertisement on one side and a protest against the police on the other side. The Court said that this was still advertising and that in the distribution of commercial advertising, the judgment of the legislature concerning the

appropriate accommodation of interests is final. 316 U.S. at 54. The Court noted that:

> The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems *an undesirable invasion of, or interference with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated.* 316 U.S. at 54-55. (Emphasis added.)

In the instant case, the Council of the City of Shaker Heights by prohibiting political advertisement is within the *Valentine* principle in exercising its control over commercial advertising by allowing *only* commercial advertising, thus drawing a clear dividing line between commercial and political advertising.

CONCLUSION

The courts below correctly found that plaintiff-petitioner's constitutional rights were not violated by the long-standing policy of the City of Shaker Heights.

The evidence in the case and plaintiff-petitioner's legal argument do not disclose any wrongful discrimination on the part of the City. No deprivation of rights protected by the First and Fourteenth Amendments to the United States Constitution (or Article I, Section 11, of the Constitution of the State of Ohio) has occurred, because no forum for the unrestricted expression of all forms of ideas has been created or established. The City has not opened up its transit cars to any exchange or presentation of ideas, political or otherwise. The sale of space for commercial advertising does not create such a forum or confer First Amendment rights. No court has so held.

The Petition should be denied.

Respectfully submitted,

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DEC 26

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